IN THE

Supreme Court of the United States

October Term, 1944.

No. 1152.

COURTNEY M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, NORTON MOCKRIDGE, GEORGE S. TROW and WILLIAM L. O'DONOVAN,
Petitioners,

against

WHITE PLAINS PUBLISHING COMPANY, INC.,
Respondent.

Motion to Dispense with Reprinting Record on Certiorari, Petition for Writ of Certiorari to the Court of Appeals of the State of New York and Brief in Support of Petition for Writ of Certiorari.

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DAVID H. MOSES,
STEPHEN R. J. ROACH,
On the Brief.

THE REPORTER COMPANY, Inc., Walton, N. Y.
1945

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IN THE

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Petitioners,

against

WHITE PLAINS PUBLISHING COMPANY, Inc.,

Respondent.

Motion to Dispense With Reprinting Record on Certiorari.

State of New York,
County of Rockland, ss:

DAVID H. MOSES, being duly sworn, deposes and says that he is an attorney at law associated with LEXOW & JENKINS of which firm MORTON LEXOW is the attorney of record for the petitioners herein in this Court. That your deponent is also admitted to the bar of this Court. That your deponent has been in charge of this matter since Mr. Morton Lexow was retained as attorney of record to seek review in this Court.

That this is a motion to have the petition for a writ of certiorari heard on a single printed certified copy of the record in the court below and to dispense with the necessity of having the Clerk of this Court reprint the entire record of the court below on this application for certiorari.

4 The reasons why this relief is requested are as follows:

1. Counsel has endeavored through negotiations with counsel for the respondent and with the Clerks of the Court of Appeals and the Appellate Division to obtain sufficient copies of the record to file with this Court and has been advised that no extra copies are obtainable.

2. That the petitioners prevailed in the Trial Court and the respondent, in appealing to the Appellate Division, did not print extra copies of the record.

3. When the petitioners appealed to the Court of Ap-
5 peals of the State of New York from the reversal in the Appellate Division, they obtained from the Court of Appeals permission to have the appeal heard on the few extra copies of the record that were then available and to dispense with reprinting the record.

4. The petitioners are only able to obtain two copies of the record, one of which has been certified and forwarded to this Court, and the other copy is for use of counsel.

5. Petitioners have endeavored to obtain from the counsel for the respondent a stipulation omitting unessential and unnecessary portions of the printed record
6 and after making every reasonable effort for that purpose have been unable to obtain such stipulation.

(a) On February 16th, 1945, your deponent wrote to Frances K. Marlatt, attorney for the respondent in the State Courts, as follows:

> "Since the review will only involve the question of Interstate Commerce, we inquire whether you will stipulate to omit unnecessary portions of the record."

(b) On February 23rd, 1945, Miss Marlatt wrote your deponent as follows: 7

> "My client believes that the entire record is necessary for the determination of any question involved in this case and therefore is unwilling to stipulate that anything be omitted from the record."

(c) Thereafter, your deponent moved in the Court of Appeals to amend the remittitur so as to have that Court state that the cause was disposed of upon the single issue of Interstate Commerce. That motion was granted and on the 8th of March, 1945, the remittitur was amended limiting the issue to the question of Interstate Commerce 8 (Record, p. 547).

(d) That pending such motion to the Court of Appeals, Associate Justice Jackson of this Court extended the time of the petitioners to apply for a writ of certiorari sixty days from February 12th, 1945.

(e) That after the amendment of the remittitur by order of the Court of Appeals, petitioners' counsel again wrote counsel for the respondent asking to omit unnecessary portions of the record and on March 21st, 1945, we were advised by counsel for the respondent that:

> "The entire testimony of the complaining witnesses, together with their exhibits, as well as the 9 entire testimony of the defense witnesses must be printed."

6. On March 29th, 1945, your deponent personally brought the certified copy of the record to the Clerk of this Court for filing and it was examined by the Clerk who advised your deponent that to reprint the record, consisting of over 560 pages, would cost at least Fifteen Hundred ($1500.00) Dollars and that since the time to file certiorari under the order of Judge Jackson possibly expired on April 13th, 1945, that sufficient time did not remain for the Clerk to print the record in time.

10 7. That your deponent inquired of the petitioners and has been advised that they are unable to raise sufficient money to pay for the printing of the record and the other disbursements incidental to this petition for the following reasons:

(a) One of the petitioners; to wit, Courtney M. Mabee is in the armed services and is unable at this time to contribute anything to the cost of this litigation;

(b) The other petitioners are salaried employees and have not sufficient money or property to bear the expense themselves;

11 (c) That the petitioners were promised by the Newspaper Guild, who intends to file a brief *amicus curiae* if the petition herein is granted, a contribution to help pay the expenses and, for reasons unknown to the petitioners, at the February meeting of that group, the motion to authorize the expenditure was inadvertently omitted from the calendar and your deponent has been informed that the next meeting at which such matter will be taken up, will occur in the month of May, 1945.

8. That the question involved herein is primarily one of law and that the facts necessary to determine that question can be summarized on a page and that since the entire printed record will be filed with this Court, either
12 counsel can, in the petition and reply, quote such portions of the record as they deem necessary to the issue of Interstate Commerce which is the only issue upon which review is sought and which is the only issue upon which the New York Court of Appeals determined the federal question involved.

9. That the petitioners have made arrangements for the printing of this motion, petition and brief for certiorari and respectfully request that on this proceeding the reprinting of the entire record by the Clerk be dispensed with. If petition for certiorari is granted, counsel will

endeavor again to arrange to have a condensed record printed sufficient to review the question upon which certiorari may be granted. 13

DAVID H. MOSES.

Sworn to before me, this
7th day of April, 1945.
Beatrice Rittendale
Notary Public,
Rockland County, N. Y.

IN THE 14

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1944,

No.

COURTNEY M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, NORTON MOCKRIDGE, GEORGE S. TROW and WILLIAM L. O'DONOVAN,

Petitioners,

against 15

WHITE PLAINS PUBLISHING COMPANY, Inc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

16 COURTNEY M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, NORTON MOCKRIDGE, GEORGE S. TROW and WILLIAM L. O'DONOVAN, by their attorneys, pray that a writ of certiorari issue to review the judgment and order of the Court of Appeals of New York entered in the above case on the 16th of November, 1944, dismissing the complaint against the respondent and affirming the judgment of the Appellate Division of the Supreme Court of New York for the Second Judicial Department which reversed, on the law and on the facts, the judgment of the Trial Term of the Supreme Court, Westchester County, and dismissed the complaint on the law which judgment and
17 order of the Court of Appeals was amended by order entered on the 9th of March, 1945.

Opinions Below.

The opinion of the Trial Term, Supreme Court, Westchester County, is reported at 180 Misc. 8, 41 N. Y. S. 2d 534 (our p. 535, *et seq.*).

The opinion of the Appellate Division of the Supreme Court for the Second Judicial Department is reported at 267 A. D. 284, 45 N. Y. S. 2d 479 (additional papers, pp. 551-561).

18 There is no opinion in the Court of Appeals in affirming the Appellate Division except the memorandum reported at 293 N. Y. 781.

The order of the Court of Appeals amending the remittitur appears in the record at page 547 and is reported in the New York Law Journal, March 10th, 1945, and has not yet been officially reported.

Jurisdictional Statement.

The remittitur of the Court of Appeals of New York was entered on the 16th of November, 1944, and amended by order entered on the 9th of March, 1945.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended, by the Act of February 13th, 1925, for the reasons:

1. That the Appellate Division of the Supreme Court and the Court of Appeals of the State of New York have decided a federal question of substance not heretofore determined by this Court;

2. That they have decided it in a way not in accord with the applicable decisions of this Court;

3. That the New York Courts expressly considered the question an open one in this Court and one that should be decided by this Court;

4. That the decisions in the United States District Courts are in conflict and some District Courts have suggested that the question should be decided by this Court;

5. That the result of the decisions of the Courts below has been to deny to the petitioners their claim under a federal statute.

The Federal Question as Stated by Court of Appeals in the Amendment of Remittitur Is:

> "Motion to amend remittitur granted. Return of remittitur requested and when returned it will be amended by adding thereto the following: Upon this appeal there was presented and necessarily passed upon the question whether the respondent was engaged in interstate commerce or in the production of goods for interstate commerce within the

meaning of the Fair Labor Standards Act of 1938. This court held that the respondent was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938" (Court of Appeals, March 9, 1945).

The federal question was passed upon in the motion to dismiss the complaint, as appears from the opinion of Mr. Justice Witschief, at Special Term, 179 Misc. 832; 38 N. Y. S. 2d 231, is as follows:

"The action is brought to recover overtime compensation under the provisions of the Fair Labor Standards Act of 1938, 29 U. S. C. A., Sec. 201. *et seq.* The defendant published a newspaper at White Plains, N. Y., during the periods mentioned in the complaint and it is alleged in the complaint that the defendant was engaged in interstate commerce and during said periods sent and delivered its newspaper to various parts of the United States and did not confine such delivery to the State of New York. When the defendant discontinued its publication of a newspaper, its total daily circulation was 5,000 of which forty-two copies were sent to points outside of New York State. All of the objections made to the Fair Labor Standards Act of 1938 in regard to its application to the defendant have been overruled in the U. S. District Court for the District of Massachusetts, in *Fleming, Adm'r, etc., v. Lowell Sun Co.*, 36 F. Supp. 320. The Federal Courts have held that newspapers are subject to the Fair Labor Standards Act of 1938. *A. H. Belo Corporation v. Street*, D. C., 36 F. Supp. 907. And the U. S. Supreme Court has held that the Associated Press is engaged in interstate commerce. *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 57 S. Ct. 650, 81 L. Ed. 953. That Congress considered the act as applicable to daily newspapers is indicated by the eighth exemption in Section 13 of the act which excludes weekly or

semi-weekly newspapers with a circulation of less than 3,000, the major part of which is in the county where the publication is issued. It is not for this court to consider either the wisdom or the justice of the application of the act to daily newspapers in such localities as White Plains, only a very small portion of whose circulation goes without the state."

The Trial Justice passed on the federal question to the same extent as Justice Witschief (41 N. Y. S. 2d 534, p. 537); (180 Misc. 8); (Record, p. 533).

"Prior to the trial the defendant had moved before Mr. Justice Witschief to dismiss the complaint. The questions raised upon that motion were decided in accordance with the statute and authoritative precedents. The court at this time reaffirms the decision of Mr. Justice Witschief (179 Misc. 832, 38 N. Y. S. 2d 231) to the full extent thereof."

The Appellate Division, in reversing the judgment of the Trial Court, passed upon the federal question as follows (Record, p. 553), (45 N. Y. S. 2d 479, pp. 481-485), (267 A. D. 284):

"* * * Nor is it necessary for us to pass upon these questions because this judgment must be reversed for the reason that appellant and respondents were not engaged in commerce within the meaning of the Act, and Congress never intended it to apply to the situation disclosed by this record."

* * * * *

Record, page 554:

"The conclusion is irresistible that appellant was engaged in a strictly local as distinguished from a national activity, *i. e.*, the local business of publishing a local newspaper. It did not produce goods for commerce within the meaning of the Act and, consequently, plaintiffs were not engaged in

28 any process or occupation necessary to the production thereof."

• • • • •

The question was raised on appeal to the Court of Appeals, by specification in the notice of appeal to that Court, that an appeal was taken from each and every part of the judgment of the Appellate Division (Record, p. 561). Under the practice of the State of New York, this was the prescribed method for bringing up a review of the entire judgment of the Appellate Division (Civil Practice Act, Section 562). The question was briefed in the briefs of both the petitioners and respondent submitted to the
29 Appellate Division and to the Court of Appeals.

The Court of Appeals, after affirming the judgment of the Appellate Division without opinion on November 16, 1944, amended the remittitur on March 9th, 1945, to state as set forth above.

The grounds upon which it is contended that the question involved is substantial are set forth under the reasons for granting the writ *infra,* pages 15 to 18.

Statute Involved.

The statute involved is the Fair Labor Standards Act
30 of 1938 (Act of June 25th, 1938, Chapter 676, 52 Stat. 1060, U. S. C. Title 29, Sec. 210 *et seq.*). The particular provisions drawn into question herein are:

"Sec. 3. As used in this Act—

• • • • •

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

• • • • •

"(i) 'Goods' means goods (including ships and 31
marine equipment), wares, products, commodities, merchandise or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof.

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working 32
on such goods, or in any process or occupation necessary to the production thereof, in any State."

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a work week longer than forty-four hours during the first year from the effective date of this section,

"(2) for a work week longer than forty-two hours during the second year from such date, or

(3) for a work week longer than forty hours 33
after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

See also appendix A and B which set forth Section 13 pertaining to exemptions and portions of Section 15 pertaining to prohibited acts:

34 **Statement of Matter Involved.**

The petitioners were employees of the respondent who was engaged in publishing a daily newspaper at White Plains, New York. The petitioners were engaged in the process of obtaining, receiving and soliciting news, rewriting, editing and preparing the material for publication and obtaining news and advertising from various sources and preparing them for publication. They sued for overtime compensation under the Fair Labor Standards Act of 1938 and received an award of $42,010.34 for overtime compensation under the Act from the Trial
35 Court who tried the issues without a jury. This judgment was reversed by the Appellate Division of the Supreme Court, Second Department, on the law and on the facts and the complaint dismissed on the law and the reversal affirmed by the Court of Appeals.

The respondent, to produce its newspaper, made daily and immediate use of news dispatches received by direct teletype connection from the Associated Press and International News Service from points outside of the State of New York and from other states and foreign countries (Record, pp. 48, 146, 295). These teletype machines were operated daily from morning to night (p. 296). News items were sometimes taken off the teletype ma-
36 chines and printed without change (pp. 412, 441). Respondent had national advertising (pp. 48, 356) in the same proportion as any other daily newspaper of similar size (p. 356). Advertising mats were secured from a national advertising agency in Chicago, Ill. (p. 48), and cuts to reproduce pictures from Philadelphia, Pa. (p. 48), and comic strips, syndicated news, medical news columns and panels came from Chicago and California (p. 49). During the period in question, the respondent obtained its pictorial service from the Central Press Association

of Chicago, Ill. (p. 49). Some of the petitioners, at 37
times, sold advertising in Connecticut and New Jersey to concerns in those states (p. 66) and some of the petitioners, as reporters, covered events in South Norwalk and Greenwich, Connecticut (p. 276). The paper used by the respondent came from Maine (p. 48). In February, 1939, respondent ran a full page advertisement announcing that they were expanding their national and international news service because of importance to their readers, because "the war would influence everyone's life," and because "of everyone's interest in world conditions" (p. 324). When France capitulated in this war a special edition of the paper was run (p. 445). The 38
respondent had a daily, regular out-of-state circulation (pp. 64, 65) to about 45 subscribers located without the state (p. 357). The weekly* production for this purpose amounted to 270 copies or over 14,000 per year.

The total daily production fluctuated between 9,000 to 11,500 copies. The petitioners did not explore at the trial how many of the other copies produced and delivered to newsdealers or sold on the streets may have reached interstate commerce or how many were sent gratis or otherwise to national advertisers or similar persons. Defendant's Exhibit A, a study of small daily newspapers under the Fair Labor Act, prepared by the United States Department of Labor, Wage and Hour Division, 39
Economics Branch, discloses that a sampling of out-of-state circulation of the average daily newspaper in an average territory varied from .8% to 9% of the total daily production. The out-of-town state circulation of the respondent was about .5%.

Under the agreement between the respondent and the International News Service Department and the King

*Overtime under the Fair Labor Act is computed upon a weekly base of 40 or more hours. (See 7-a of the Act, supra, which weekly base was varied each of the first three years of the Act.)

40 Feature Syndicate (p. 347), the respondent was obligated to send news items to the syndicate for republication in other parts of the country if of interest.

The respondent by its link to the Associated Press and the International News Service's nation-wide networks, was served by the same wireless, cable, and other means of communication that are used by the Press Services in receiving and transmitting news (pp. 295-296).

Under the respondent's agreement with the International News Service Department of the Kings Feature Syndicate, dated March 27, 1939 (Petitioners' Exhibit 15, admitted p. 347) news obtained or published by respond-
41 ent was to be sent into the channels of interstate commerce upon request or if interest to the other subscribers of the news service.

The Appellate Courts below disregarded the use of interstate instrumentalities and the flow of materials from points outside of the state to the newspaper and considered only the sending of forty-five copies each day of each week to the subscribers out of the state. It further held that such number was too insignificant or too inconsequential under the doctrine of "*de minimis non curat lex*" to bring the respondent under the coverage of the Act.

42

Questions Presented.

1. Was the respondent* engaged in interstate commerce, or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938 during the period alleged in the complaint?

2. Was the Court below correct in refusing to consider all the interstate activity of the respondent proved

* If the respondent is held so engaged then each employee engaged in that process or in production of goods for such commerce is so engaged. Kirschbaum v. Walling, 316 U. S. 517.

except the actual mailing of the product each day to the 45 out-of-state subscribers in determining the question of interstate commerce? 43

3. Was the doctrine of *de minimis non curat lex* applicable under the Fair Labor Standards Act and under the facts of this case?

Reasons for Granting the Writ.

1. The Appellate Division of the New York Supreme Court and the Court of Appeals have decided a federal question of substance not heretofore determined by this Court. The Appellate Division of the Supreme Court of the State of New York, in its opinion in this case, stated that it had made "independent search" (Record, p. 555) and that it had found no case in the United States Supreme Court where the Act was held applicable under the facts herein, stating (Record, p. 553): 44

> "While the Supreme Court has sustained the constitutionality of the Act (*United States v. Darby*, 312 U. S. 100 (1 WH Cases 17), and *Opp Cotton Mills v. Administrator*, 312 U. S. 126 (1 WH Cases 26), it has not considered the precise questions now posed."

While District Judge J. T. O'Connor in *McKeown v. Southern California*, 52 Fed. Supp. 331, in holding that the *de minimis* doctrine was inapplicable in a case arising under the Fair Labor Act stated: 45

> "This important ruling has not yet been passed upon by either the Circuit or Supreme Courts."

2. The Appellate Courts of New York have decided this federal question of substance not in accord with applicable decisions in this Court concerning Interstate Commerce.

46 3. The Appellate Courts of New York have definitely refused to follow the controlling decisions in the Federal Courts upon the issue involved. The newspaper cases where the precise issue was decided or discussed are:

Sun Publishing Company v. Walling, 140 Fed. 2d 445, certiorari denied U. S. , April 24th, 1944, 64 S. Ct. 496.

Fleming v. Lowell Sun Company, 36 Fed. Supp. 320, reversed on other grounds, 120 Fed. 2d 213, affirmed by an equally divided court 315 U. S. 784.

Schroepfer, et al., v. A. S. Abell Co., 138 Fed. 2d 111, certiorari denied U. S. , January 17th, 1944.

47 *Belo v. Street*, 36 Fed. Supp. 907.

Walling v. Oklahoma Press Publishing Company, District Court Oklahoma, June 12th, 1944, Fed. .

The decisions in those cases and the discussions were to the effect that the employees of newspapers situated similarly as respondent were governed by the Fair Labor Standards Act of 1938.

4. There is a conflict between the many decisions in the United States District Courts on the precise point involved herein. The overwhelming authority, however, being with the contention of the petitioners.

48 5. The doctrine of "*de minimis non curat lex*" is not applicable under the Fair Labor Standards Act, the great weight of decisions under that Act and the Bulletins of the Wage and Hour Division of the Department of Labor all support this view. We collate in our brief the many cases which hold that under the history and structure of the Fair Labor Standards Act, the doctrine of "*de minimis non curat lex*" is inapplicable, especially where the out-of-state activity is not casual or spasmodic, but a regular, continuous daily feature such as in this case where the newspapers that were sent out of the state were sent

out each day of each week of each year to regular sub- 49
scribers and the weekly or yearly production for that purpose was substantial in amount (over 14,000 copies per year).

6. The Administrator of the Wage and Hour Division of the Department of Labor has not acquiesced in the decision of the New York Appellate Courts below since both in the Appellate Division and in the Court of Appeals, the Administrator filed a brief "*amicus curiae,*" urging that the respondent was engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938 under the facts proved in this case.

7. That this case is of the utmost public importance 50
since if the decision of the New York Appellate Courts stands, it will exclude from the coverage of the Wage and Hour Law all the employees of virtually all daily newspapers published in New York State, since the circumstances of their publication is substantially similar to that of respondent. According to the 1940 U. S. census about one-third of the persons engaged in the producing of newspapers in the United States are located in the State of New York. If the decision of the Appellate Courts of New York stand, it will deprive a considerable number of those employees of the benefits of the Act. This will have the effect of adding to the Act a further 51
exemption than the one provided for in Section 13 (a), Subdivision (8), (Appendix A), which exemption is restricted to employees of "any weekly or semi-weekly newspaper with a circulation of less than three thousand, the major part of which circulation is within the county where printed and published * * *." Congress never intended to exclude from the benefits of the Act employees of daily newspapers or other newspapers not specifically within the exemption quoted.

52 WHEREFORE, your petitioners pray that a writ of certiorari be issued under the seal of this Court to review the decision of the Court below.

Dated, April 10th, 1945.

COURTNEY M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, NORTON MOCKRIDGE, GEORGE S. TROW and WILLIAM L. O'DONOVAN,

By MORTON LEXOW,
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DAVID H. MOSES,
STEPHEN R. J. ROACH,
On the Brief.

APPENDIX A.

Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or
54 local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivation, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of ani-

mal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products, or by-products thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semi-weekly newspaper with a circulation of less than three thousand, the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

58 **APPENDIX B.**

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that
59 no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation.

60

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

COURTNEY M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, NORTON MOCKRIDGE, GEORGE S. TROW and WILLIAM L. O'DONOVAN,

Petitioners,

against

WHITE PLAINS PUBLISHING COMPANY, Inc.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Preliminary Statement.

The opinions below, the statement of the matter involved, jurisdiction and the questions presented appear in the Petition for a Writ of Certiorari herein and in the interest of brevity are incorporated here by reference.

II.

Summary of Argument.

POINT I.

The business of receiving, transmitting, exchanging news, intelligence and advertising through the use of Interstate Communications and agencies constitutes Interstate Commerce and the Producing therefrom a product (a daily newspaper) constitutes producing goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

POINT II.

There is no expression in this Court in a case under the Fair Labor Standards Act which justified the courts below in applying the "de minimis" doctrine. On the contrary, this Court has said in effect otherwise.

POINT III.

The doctrine of "de minimis" is inapplicable under the facts and controlling decisions in the Federal Courts which decisions the Courts below refused to follow.

III.

Argument.

POINT I.

The business of receiving, transmitting, exchanging news, intelligence and advertising through the use of Interstate Communications and agencies constitutes Interstate Commerce and the Producing therefrom a product (a daily newspaper) constitutes producing goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

The provisions of the Act are set forth in the petition. Section 3 (a) includes "transmission" as well as "transportation" and "communication" "among the several states or from any state to a place outside thereof" within the word "commerce" as used in the Act.

Under Subdivision (i) "goods" includes "products" "or subjects of any character."

Under Subdivision (j) "produced" includes "handled" "or in any other manner worked on in any state * * *."

The decisions under the Act where employees of daily newspapers were concerned support the petitioners' contentions of coverage:

In *Sun Publishing Company v. Walling,* 140 Fed. 2d 445, certiorari denied 64 S. Ct. 496, April 24th, 1944, the Court said:

> "The appellant publishes The Jackson (Tenn.) Sun, a newspaper with a circulation of 9,000 daily

and 11,000 on Sunday. Approximately 200 copies of each edition are sold outside of the state. An added number of copies are sent extrastate as complimentary or to national advertisers for confirmation of their advertisements. The newspaper is a member of the Associated Press and not only receives news from it but transmits to it news items originating in its own territory. It also receives news from the United Press Association, receives from out of the state the comic supplement which it distributes with its Sunday edition to both local and outside subscribers, and uses syndicated articles sent to it by mail from various national services. It carries a substantial volume of national advertising for out-of-state producers and distributors who usually send it their mats or electrotype plates for printing. Substantially all of its paper and other materials are shipped to it from outside the state. Its employees include the writers and reporters who gather, compose and edit the news stories and write headlines, the linotypers and sterotypers, pressmen, subscription and circulation employees, and the like."

"The contention that the Act is not applicable to the appellant's business because its employees are not engaged in commerce or the production of goods for commerce, must be repected on the authority, among others, of *Associated Press v. N.L.R.B., supra.*"

In *Fleming v. Lowell Sun Company,* 36 Fed. Supp. 320, reversed on other grounds 120 Fed. 2d 213, and affirmed by an equally divided Court, 315 U. S. 784. 1 WHR 418, at page 422:

"It is common knowledge that the instrumentalities of interstate commerce are used and affected by every newspaper in gathering and publishing news and preparing the newspaper for circulation both in and out of the State in which it is published. This point has been raised time and time again, and it is too late in this case, under the

doctrine laid down by the recent cases of *Associated Press v. National Labor Relations Board,* 301 U. S. 103 (1 LRR Man. 732), and *National Labor Relations Boards v. A. S. Abell Co.,* 97 F. 2d 951 (2 LRR Man. 679), and cases cited, to raise it successfully now. Cf. *Gibbons v. Ogden,* 9 Wheat. 1, 6 L. Ed. 23; *National Labor Relations Board v. Fainblatt,* 306 U. S. 601 (4 LRR Man. 535), where the Court said: 'The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small.' "

In *Walling v. Oklahoma Press Publishing Company,* U.S.D.C. E.D. Oklahoma, June 12th, 1944, the District Judge, in holding a local newspaper under the Act, stated:

"The Company receives its news in the usual manner. Out-of-state news is received over telegraphic wires by means of an automatic teletype machine which requires no one to operate. The Company then selects that part of such news as is desired and publishes it, discarding the remainder. Its out-of-state ads are received through the United States mail, a large part thereof being in the form of mats and electrotype plates. The Company deals with an out-of-state representative in handling this out-of-state advertising. The advertisers pay an out-of-state representative, and the out-of-state representative in turn pays the Company, after deducting his commission. At the hearing, the Company admitted that much of its newspaper supplies, paper, machinery, etc., are purchased outside the State of Oklahoma."

Schroepfer, et al., v. A. S. Abell Co., 6 WHR 940, 138 Fed. 2d 111:

"There is no question but that the defendant is engaged in interstate commerce with respect to the publication of its papers, the gathering of news therefor and the sale of the portion of its papers sent out of the state. *N.L.R.B. v. A. S. Abell Co.,* 4 Cir., 97 F. 2d 951, 954 (2 LRR Man. 679)."

Belo v. Street, 36 Fed. Supp. 907, where the District Judge stated:

> "Of course, the news is engaged in interstate commerce. It sends its papers everywhere. It receives supplies and news from abroad."

Interpretative Bulletins of the Wage and Hour Division, United States Department of Labor, No. 1, at page 4:

> "From this declared policy of Congress it is evident that, apart from certain specific exemptions enumerated later in the statute, Congress intended the widest possible application of its regulatory power over interstate commerce; and the Administrator, in interpreting the statute for the purpose of performing his administrative duties, should properly lean toward a broad interpretation of the key words, 'engaged in commerce or in the production of goods for commerce.' * * *"

Western Union Telegraph Company v. Lenroot, United States Supreme Court, January 8th, 1945, U. S. :

> "It was long ago settled that telegraph lines when extending through different states are instruments of commerce and messages passing over them are a part of commerce itself. *Western Union Telegraph Co. v. James,* 162 U. S. 650, 654. That 'ideas, wishes, orders, and intelligence' are 'subjects' of the interstate commerce in which telegraph companies engage has also been held. *Western Union Tel. Co. v. Pendleton,* 122 U. S. 347, 356; cf. *Associated Press v. National Labor Relations Board,* 301 U. S. 103, 128 (1 LRR Man. 732). It is unnecessary to decide whether electric impulses into which the words of the message are transformed are 'goods' within the Act (cf. *Utah Power & Light Co. v. Pfost,* 286 U. S. 165; *Fisher's Blend Station, Inc., v. State Tax Commission,* 297 U. S. 650; *Electric Bond & Share Co. v. Securities & Exchange Comm.,* 303 U. S. 419), since the complaint is not based on 'shipment' of impulses as 'goods' but only of messages. We think telegraphic mes-

sages are clearly 'subjects of commerce' and hence that they are 'goods' under this Act, as alleged in the complaint."

See also *Kirschbaum v. Walling*, 316 U. S. 517, and *United States v. Darby*, 312 U. S. 100.

Cases generally defining the scope of "Interstate Commerce" and Federal Acts which may be urged to support petitioners' contentions are:

Associated Press v. National Labor Board, 301 U. S. 103.

United States v. Underwriters Association, 322 U. S. 533, particularly at p. 549.

Polish National Alliance v. National Labor Relations Board, 322 U. S. 643.

POINT II.

There is no expression in this Court in a case under the Fair Labor Standards Act which justified the Courts below in applying the "*de minimis*" doctrine. On the contrary. this Court has said in effect otherwise.

In *United States v. Darby*, 312 U. S. 100, at p. 123, this Court stated:

> "Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce for any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. See H. Rept. No. 2182, 75th Cong., 1st Sess., p. 7. The legislation aimed at a whole embraces all its parts."

In *Kirschbaum v. Walling, supra,* this Court noted, at page 521:

> "Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, *if isolated, are only local.*" (Italics ours.)

It cannot be said that the respondent "isolated" itself from "Interstate Commerce."

The Wage and Hour Administrator in his Interpretative Bulletin No. 5, page 5, stated:

> "Where an employee is engaged in the production of any goods for interstate commerce, the act makes no distinction as to the percentage of his employer's goods or of the goods upon which he works that move in interstate commerce. The entire legislative history of the act leads to the conclusion that Congress intended to exclude from the channels of interstate commerce all goods produced under labor conditions detrimental to the health, efficiency, and general well-being of workers. The President's message advocating the passage of wage and hour legislation stated that 'goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade.' The Congress expressly found in section 2 (a) (1) that the production of goods under labor conditions detrimental to health, efficiency, and general well-being of workers 'causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States.' The reference in section 15 (a) (1) to 'any goods' is convincing proof of this intent of Congress to make no distinction as to the percentage of goods which move in interstate commerce. That section makes it unlawful for any person '(1) to transport, offer for transportation,

ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7.'

"Thus, there is no justification for determining the applicability of the act to a particular employee on the basis of the percentage of the goods he produces, or of his employer's goods, which move in interstate commerce." (Italics ours.)

The United States Supreme Court as to interpretative bulletins said in *United States v. American Trucking Association*, 310 U. S. 534, at page 549:

"The Commission and the Wage and Hour Division, as we have said, have both interpreted Sec. 204 (a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' "

And in *Walling v. Oklahoma Press Publishing Company, supra,* the District Judge wrote in holding the employees under the Act:

"Since June 1, 1939, no papers have been sold by the Company to persons outside the State of Oklahoma, unless it might be said that the sending of papers to out-of-state advertisers constitutes a sale, although no sum is paid for the papers as such. The Company mailed, without charge, to former Muskogee residents in the armed forces approximately 120 copies of the Muskogee Daily Phoenix, and approximately 17 copies of the Muskogee Times-Democrat. The Company also mails to its out-of-state representative for advertisers a copy of each paper for each foreign advertiser. The number of papers so sent is approximately 67 daily."

In *Sun Publishing Company v. Walling, supra,* the Circuit Court said where 200 copies out of 9,000 were sold outside the state:

> "Likewise it is unimportant that only a small percentage of appellant's newspapers are sent out of the state. *U. S. v. Darby,* 312 U. S. 100 (1 WH cases 17); *Chapman v. Home Ice Co.,* 136 F. 2d 353 (6 WHR 570) (C. C. A. 6). The Act, by its terms, is applicable to newspapers generally because by its express terms it exempts weeklies and semi-weeklies and those with circulations less than 3,000."

In *Fleming v. Lowell, supra,* the District Judge observed:

> "The respondent contends, in resisting the order sought, that the Administrator is without jurisdiction over the respondent's affairs because of the infinitesimal amount of respondent's circulation that crosses the state lines.
>
> "In support of this contention the respondent argues that more than 98% of its total average daily circulation is distributed entirely within the Commonwealth of Massachusetts. To be sure, the Congress in passing the Act was exercising its power to regulate commerce to correct and eliminate the conditions referred to in its findings set out in Section 2 (a) of the Act. However, the percentage or number of newspapers of the respondent that crossed state lines is not controlling on the question of whether or not the respondent is engaged in commerce between the states."

The Appellate Division below sought to distinguish this case by stating (Record, p. 560):

> "Respondents also rely on *Fleming v. Lowell Sun Co.* (36 F. Supp. 320; reversed on other grounds, 120 F. 2d 213, and affd. by an equally divided court, 315 U. S. 784). That case, so far as material, is authority only for the proposition that a large newspaper is engaged in interstate commerce. (See *Schroepfer v. A. S. Abell Co., supra,* p. 115.)"

The Wage and Hour Administrator has expressly denied any such distinction. See Defendant's Exhibit A, page 67:

> "The Wage and Hour Division has generally held that employees of small newspapers, when not specifically exempted by the language of Section 13 (a) (8) of the Act, are covered by the wage and hour provisions of the law if they aid in the flow of interstate commerce to the paper or if they help to produce a paper or job work which goes outside the state or leads to a flow of commerce across state boundaries.[1] This interpretation has been applied to small newspapers as well as large ones, and almost all newspaper employees not specifically exempted have, in short, been held to be covered."

POINT III.

The doctrine of "*de minimis*" is inapplicable under the facts and controlling decisions in the Federal Courts which decisions the Courts below refuse to follow.

The Courts below relied on three cases in the District Courts. These cases are:

Goldberg v. Worman, 37 Fed. Sup. 778.
Zehring v. Brown Materials, 48 Fed. Sup. 740.
Sapp, et al., v. Horton's Laundry, 56 Fed. Sup. 901.

They are opposed by such cases as:

McKeown v. Southern California, 52 Fed. Supp. 331, 6 WHR 1016, where District Judge J. T. O'Connor refused to apply the doctrine under the Wage and Hour Law where the interstate activity, as small as it might be,

[1] Wage and Hour Division, press releases, July 14, 1939, and August 13, 1941.

was a regular every-day and every-week part of the business of the employer and was not casual or spasmodic. He stated:

> "The activities of the plaintiff, under the facts, were not casual nor spasmodic, but rather a continuous, regular and integral part of his everyday and every week business, partaking of an interstate character. Withholding recognition of these salient factors would be interpolating language into the Act which was not intended by Congress nor observed by the cases construing the statute. It is the opinion of this court that the rule *de minimis* is not applicable in view of the decisions cited and the stipulation submitted."

In *Ling, et al., v. Currier Lumber Co.*, 6 WHR 401, 50 Fed. Supp. 204, the District Judge, in noting that this Court stated in *United States v. Darby* that Congress "has made no distinction as to the volume or amount of shipments," stated:

> "Therein lies the distinction and in our opinion it is now generally accepted that when even less than one per cent of one's business is in interstate commerce, that business is subject to the Fair Labor Standards Act, unless that 'less than one per cent' was a casual or isolated sale."

Also:

Drake v. Hirsch, 40 Fed. Sup. 290, 1 WHC 702, U. S. D. C. N. D. Georgia.

Muldowney v. Seaberg Elevator Co., 39 Fed. Supp. 275, 1 WHC 605, U. S. D. C. E. D. New York.

Nelson v. Southern Ice Co., U. S. D. C. N. D. Texas, 1 WHC 787.

Strand v. Garden Valley Telephone Co., 6 WHR 1087, U. S. D. C. District of Minnesota.

Elmore v. Cromer & Beaty Co., Inc., 6 WHR 861, U. S. D. C. W. D. South Carolina, August 2, 1943.

Philips v. Star Overall Dry Cleaning Co., 7 WHR 92, U. S. D. C. S. D. New York, January 6, 1944.
Dorner v. Iaco Clothes, Inc., 7 WHR 35, U. S. D. C. N. D. Illinois.
Walling, etc., v. Partee, et al., 6 WHR 863, U. S. D. C. Tennessee.
Walling v. Oklahoma, 7 WHR 655, U. S. D. C. E. D. Oklahoma.
Gerdert v. Certified Poultry & Egg Co., 38 Fed. Supp. 964, 1 WHC 577.
Wood v. Central Sand & Gravel Co., 33 Fed. Supp. 40, 1 WHC 326.

And others.

The most that may be said of the few cases representing the minority view is that if the Interstate Commerce activities are "casual," "spasmodic," "isolated," "rare" or "occasional" there might be some basis for invoking the doctrine although this Court has never said so and the Wage and Hour Administrator has denied it. But where, as here, the Interstate Commerce is a regular every-day, every-week activity, the doctrine, no matter how far it may be stretched, is wholly inapplicable. Furthermore, the case at bar involving a daily newspaper is radically different than the three cases cited above relied upon by the respondent. The respondent herein is dependent upon its direct tieup with instrumentalities and agencies of Interstate Commerce to produce its product without which it could not successfully compete or operate as a daily newspaper.

The Appellate Division below seized upon a stray sentence in *National Labor Relations Board v. Fainblatt, supra* (p. 607), to justify invoking the doctrine of *"de minimis."* This they were not justified in doing because:

1. The decision in the *Fainblatt* case was under another Federal Act and as Mr. Justice Frankfurter so

aptly stated in *Federal Trade Commission v. Bunte*, 312 U. S. 349, 353:

> "Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

2. The statement was not necessary to the decision nor was the doctrine actually invoked in that case.

3. There is further language in this same case contrary to respondent's position.

4. And as the Court observed in the same case (p. 606):

> "The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication."

Neither is present under the Wage and Hour Law. First of all, under Section 15 (a) (1) as pointed out in the Administrators Interpretative Bulletin No. 5, the Act refers to "any goods" thereby negativing the idea that no goods, unless substantial in volume, should be covered under the Fair Labor Standards Act, and as the Administrator also pointed out, the Congress had carefully worked out the many exceptions or exemptions and specifically exempted newspapers having a circulation of 3,000 or less "the major part of which circulation is within the county where printed and published * * *." The Congress well knew that most daily local papers would necessarily have a small percentage of circulation beyond the place of publication. With this in mind they selected the special type of newspaper to be exempted and there included all others that utilized the channels of interstate commerce.

An example of an express provision for exemption is the Motor Carrier Act of 1935 which was enacted by almost the same Congress that enacted the Fair Labor Standards Act. Since the Fair Labor Standards Act, by express provision, refers to the Motor Carrier Act of 1935, it may be said that these Acts are in "*pari materia.*"

In the Motor Carrier Act, the express provision exempting the carriers is found in Section 203 (b) (9) which is as follows:

> "the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business * * * are exempt."

If it took an express provision to exempt even a casual or occasional transporter of persons or property from the provision of the Motor Carrier Act then surely it would take an express provision to exempt a newspaper which did not already come under the express exemption where such newspaper was in regular, daily use in the channels of interstate commerce and daily shipped a portion of their products interstate.

IV.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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